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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 44

UNITED STATES PLYWOOD CORPORATION,
Petitioner,

vs.

CITY OF ALGOMA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

REPLY BRIEF OF PETITIONER

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IN REPLY TO RESPONDENT'S BRIEF ON THE MERITS AS TO THE VENEERS

I.

The respondent's brief is constructed on the proposition that the rule of *Brown v. Maryland* and *Hooven & Allison Co. v. Evatt*—namely, that, *while imports remain the property of the importer, in his warehouse, in the original form or package in which imported, a tax on them is too plainly a tax on imports to escape the constitutional prohibition*—is beside the point. The impor-

tant thing, says the respondent, adroitly phrasing its statement in the negative, is that

> "In no case has this Court held that imported articles in the warehouse of and owned by the importer, in the unopened package or form in which imported, may not have at the same time been put to the use for which imported and, therefore, be subject to state taxation." (Brief for respondent, p. 8)

Put affirmatively, rather than negatively, the quoted statement says only that this Court has not closed the door to the possibility that imports, in the warehouse of the importer, in the original form or package in which imported, *might* be subject to state taxation *if* acted upon by the importer or put to the use for which they were imported. Obviously, this statement leaves us where we started unless it can be shown that such imports *have in fact been acted upon or put to the use for which they were imported.* This the respondent has entirely failed to do.

Except for the case of passage of title for hypothecation, which was deemed action upon the goods equivalent to a sale, respondent's brief contains only one suggestion as to how imported goods held in the warehouse of the importer, in the original form or package in which imported, might nevertheless be acted upon by the importer and thereby become subject to state taxation. In that suggestion the respondent conjures up a "new, low cost ray-penetration device" whereby imported raw materials would be "improved" while being held in a warehouse. Petitioner concedes that, if the imported veneers in the instant case had been so treated at a time when they were held in petitioner's warehouse, such veneers might well be subject to state taxation. But they would be subject to state taxation not because they were held in a warehouse available for ultimate use in a manufacturing proc-

ess, but rather because, despite the fact they were held in storage in a warehouse, they had in fact been subjected to a manufacturing process.

By actual count, the respondent has stated nine times in its brief that the reported veneers had been acted upon by the petitioner or had been put to the use for which they were imported.* But nowhere in its brief does the respondent set forth *how* the petitioner acted upon the veneers or put them to use. This is not surprising since the facts, as set forth in the Record on Appeal, cannot be construed as establishing any action upon the imported veneers or any putting them to use by the petitioner while they remained in storage in the petitioner's warehouse. The record certainly makes no reference to any "new, low cost ray-penetration device". The fact is that the veneers sought to be taxed were at all times in storage, in the importer's warehouse, in the original package in which imported and segregated from the mass of taxable property in Wisconsin. They had not on the tax day been treated or processed in any way or otherwise subjected to manufacture.

II.

Having attempted to dismiss the holding in the *Hooven* case by stating what this Court had *not* held in previous cases dealing with attempts to tax imports, and by creating the image of a ray-penetration device which, if used in the manner suggested, might overcome the presumption that imported goods held in a warehouse are not being subjected to a manufacturing process, the respondent seeks to rely on Mr. Chief Justice Stone's remarks in the *Hooven* case concerning the "current operational

* See Brief for respondent, pp. 5, 7, 13, 14, 19, 20 and 21.

needs" of a manufacturing business. (Brief for respondent, p. 18) In quoting "the reasoning of this Court" on the subject of "current operational needs", the respondent failed to include the topic sentence of the relevant paragraph in the *Hooven* opinion, or even to indicate that such topic sentence was omitted from its brief. That sentence declares unequivocally that "it cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages". In essence, what the respondent would have this Court hold is that a manufacturing process begins while goods are being held in a warehouse awaiting use; in fact, this Court held in the *Hooven* case that the manufacturing process "cannot be said" to begin there.

There is not any difference between the facts in the *Hooven* case and the facts in the instant case. The difference in the records of the two cases (but not in the facts) upon which the respondent relies is that, in the instant case, a determination was made that 50% of the imported veneers in storage had somehow entered the manufacturing process. This determination has no more basis in the record in the instant case than a similar determination would have had in the record in the *Hooven* case. Such a determination is not a finding of fact, but rather a conclusion of law in clear conflict with this Court's above-quoted statement in the *Hooven* case.

The key concept in determining whether imported goods have retained their immunity from state taxation is not "current operational needs" of a business but is rather the concept of storage awaiting use. If imported goods are, in fact, being held for use by the importer, it follows that such goods have not yet been "acted upon" by the importer and have not yet been "put to the use for which they were imported."

The respondent would have this Court extend the concept of "a manufacturing process" to encompass the holding of goods for use. The respondent is handicapped by the fact that this question is no longer open. Under the *Hooven* case, imported raw materials being held for use in a manufacturing process are not subject to state taxation so long as they remain in storage, in the warehouse of the importer in the original form or package in which imported.

III.

Even if we were to accept completely the respondent's reasoning and analysis, we would be constrained to find that the respondent had not proved its case. This is because even under the respondent's analysis two questions must be answered:

Have the veneers been "acted upon" by the petitioner; if so, how? The respondent's answer has been and can only be, by placing them in storage in a warehouse and holding them for use in a manufacturing process. Under the *Hooven* case, this is obviously not enough.

Have the veneers been "put to the use for which they were imported" by the petitioner; if so, how? Again, respondent's answer can only be, by placing them in storage in a warehouse, and this is likewise obviously not *the use* for which they were imported and, under the *Hooven* case, is not any *use* at all.

But the respondent's reasoning and analysis cannot be accepted. The respondent has sought in its brief to dismiss as a "corollary" to the general rule applicable to imports the consistent holdings of this Court that while imports remain the property of the importer, in his warehouse, in the original form or package in which im-

ported, a tax on them is too plainly a tax on imports to escape the prohibition of the Constitution. But whether such holdings of this Court are called a "corollary" or are called a rule of law, the fact remains that this Court has always affirmatively held that imports so held are not subject to state taxation.

Respectfully submitted,

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